Supreme Court of the United States

OCTOBER TERM, 1925

No. 57

GREAT NORTHERN RAILWAY COMPANY, a corporation, Petitioner

vs.

CHARLES W. REED and DORA REED, his wife, Respondents

CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Brief of Respondents

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STATEMENT OF THE CASE

This action involves the title to the Southwest quarter of the Northwest quarter of Section Three, Township Thirty-nine, Range Six East, Whatcom County. It is the contention of the respondents that W. J. Tincker, a duly qualified homesteader, entered upon this land in September or October, 1901, with the purpose and intention of holding the same as a homestead under the law of the United States. It is admitted that the land was, at that time, unsurveyed, unappropriated land of the United States, subject to settlement under the homestead laws.

Respondents further claim that Tincker held this

land until about August 1, 1906, when he conveyed and relinquished all his right to the land and improvements thereon to Walter M. Smithey; that Smithey entered upon the land, occupied the same, made improvements and continued to hold it for the purpose of claiming it for a homestead until November 24, 1906, when he sold, conveyed and relinquished all his right to the land and to the improvements thereon to the respondent, Reed, who immediately entered upon the land, took possession of it and has resided upon it ever since.

While the land was so claimed and occupied a patent therefor dated April 13, 1908, was issued by the Government to the appellant, St. Paul M. &. M. Railway Company, to whose rights, if any, the appellant, the Great Northern Railway Company, has succeeded. The respondents, by this action ask judgment, that the petitioners be decreed to be the holder of the legal title to the said land in trust for respondents and also that the title to the said property be quieted in respondents. The respondents' contention has a double aspect: First, they claim that the appellants acquired title by fraud and hold the title as trustee *ex maleficio* for respondents. Second, that the respondents have acquired title to the land by adverse possession.

The petitioner filed an answer and cross-complaint

denying the allegations and praying that its own title be quieted. The trial upon these issues resulted in a decree according to respondents the relief sought. Upon appeal to the Supreme Court, this decree was affirmed by the Supreme Court of Washington. (*Reed v. Great Northern R. Co.*, 126 Wash. 312.) On a rehearing *en banc* the Court adhered to the opinion of the Department, and for the reasons therein given, the judgment was affirmed.

ARGUMENT

APPELLANTS HOLD TITLE IN TRUST FOR RESPONDENTS

There is not a great deal that we can add by way of either statement of fact, citation of authorities or argument to what is contained in the decision of this case by the Supreme Court of the State, or in the findings of fact or decision of the lower Court. It may be possible, however, for us to render some assistance by pointing out the manner in which we arrive at the conclusion that the petitioner holds the title in trust for the respondents.

The petitioner acquired legal title to the land under

an Act of Congress of August 5, 1922, (27 Statutes 390) entitled: "An Act for Relief of Settlers on Certain Lands in the States of North and South Dakota." Under this Act the petitioner was permitted to select in lieu of other lands "an equal quantity of non-mineral public lands, so classified as non-mineral at the time of actual Government survey which has been or shall be made, of the United States, not reserved and *to which no adverse right or claim shall have attached or have been initiated* at the time of making such selection." The Act then provides that the Railway Company shall file in the local Land Office a list of lands selected. The material part of this Statute so far as this case is concerned is that the lands subject to selection must be lands "to which no adverse right or claim shall have attached or have been initiated at the time of making such selection." Respondents claim that an adverse right or claim had attached or had been initiated at the time the petitioner made its selection. The selection list was filed on May 2, 1902, and was supported by the affidavit of Mr. Thomas R. Benton dated March 22, 1902, wherein he stated that the lands "are vacant, and unappropriated and are not indicated mineral nor reserve lands and of character contemplated by said Act." (Transcript page 5, 6 and 15).

The petitioner has assigned errors as follows only:

1. In refusing to adopt conclusion of law requested by the petitioner that no adverse right or claim had attached or been initiated at the time of making this selection.

2. In refusing to adopt conclusion of law requested by the petitioner that the acts of Tincker did not initiate any right or claim which exempted the land from selection.

3. In entering a decree declaring petitioner to be trustee holding the legal title to the land for the use and benefit of respondents.

4. In refusing to enter a decree quieting petitioner's title. (Petitioner's Brief pages 9 and 10.)

These are the only assignments of error, consequently the facts as found by the lower Court are unquestioned and to be taken as true, and the only question is whether the conclusions of law are supported by the findings of fact, and whether the decree is supported by the findings of fact and conclusions of law.

Findings of facts Nos. 7 and 8 are as follows:

VII.

"That in the month of September or October, 1901, the Southwest quarter (SW¼) of the Northwest quar-

ter (NW¼) of Section Three (3) Township Thirty-nine (39), North of Range Six (6) East of the Willamette Meridian, Whatcom County, State of Washington, was unappropriated public lands of the United States, subject to settlement, entry and patent under the Homestead Laws of the United States; that in the month of September or October, 1901, the said W. J. Tincker squatted and settled upon the Northwest quarter (NW¼) of Section Three (3), Township Thirty-nine (39), North of Range Six (6) East of Willamette Meridian, including the said Southwest quarter (SW¼) of the Northwest quarter (NW¼) of the said Section Three (3), which said land was at that time unsurveyed; that he settled and squatted upon the said land with the purpose and intention of holding the same as a homestead under the laws of the United States, and of filing and perfecting his title thereto under the said laws; that in pursuance of said intention and in compliance with the laws of the United States in such case made and provided, he posted notices of his rights and claims to the said land upon the same. That between the first day of February, 1902, and the first day of April, 1902, the said W. J. Tincker continued his settlement of said land and went thereon and blazed some trails and cut poles and laid the foundation for a cabin upon said land.

VIII.

"That on the 18th day of December, 1902, the said land with other land, was by order of the Department of the Interior "withdrawn from settlement, entry, sale, or other disposal pending determination as to the

advisability of including such lands within the Washington Forest reserve," and by order of September 20th, 1904, the land was released from said temporary withdrawal "and restored to settlement, but provided that the land so released from withdrawal and restored to settlement shall not be subject to entry, filing or selection under the public lands until after ninety (90) days' notice by such publication as the Land Office may prescribe." And that it was not so thrown open until February 6th, 1907; that thereafter and up to August, 1906, when he transferred his rights to Smithey, Tincker continued to claim the land as his homestead, under his right thereto by settlement and went upon the land at least once each year and renewed and kept continuously posted his notices of settlement and claim to the land as homesteader. During said time said Tincker was a married man and maintained a home at the village of Maple Falls, near by, where he, with his wife and children, lived."

Finding of Fact No. 9 is that Tincker relinquished and conveyed his interest to Smithey, and that Smithey posted notices and made improvements.

Findings of Fact. Nos. 10 and 11 and a portion of No. 12 are as follows:

X.

"That on or about the 24th day of November, 1906, the said Walter M. Smithey sold, conveyed and relinquished all his rights, title, claim and interest in and to the Southwest quarter (SW1/4) of the Northwest

quarter (NW¼) and the Northwest quarter (NW¼) of the Northwest quarter (NW¼) (also known as Lot four) of said Section Three (3) and all improvements therein to the plaintiff, Charles W. Reed, who immediately thereupon, entered, settled and squatted upon the Southwest quarter (SW¼) of the Northwest quarter (NW¼) and the said Lot Four (4), and the West half (W½) of the Southwest quarter (SW¼) of said Section three (3), with the purpose and intention of becoming a homesteader, thereby claiming the same as a homestead, under the laws of the United States, and of filing upon and entering the same as such and of perfecting his title thereto; that he has continuously occupied the land since said time and has resided thereon with his family continuously since about March 1st, 1907; that in the month of November, 1906, the said plaintiff, Charles W. Reed, began the construction of a house upon the said Lot Four (4) (Northwest quarter of the Northwest quarter) which was contiguous to the said Southwest quarter (SW¼) of the Northwest quarter (NW¼) of said Section three (3), and a part of the land claimed by plaintiff as a homestead, and shortly thereafter completed the same and ever since said time has occupied, cultivated and made his home upon the land claimed by him as a homestead including the land here in question, with the purpose and intention of claiming all of the same as a homestead under the laws of the United States, and he has never relinquished, forfeited or surrendered his rights thereto. That in November, 1906, said Reed removed the notices posted on said land by said Smithey and replaced the same with notices of his own to the effect that he claimed the said land as a homestead and has kept said notices continuously posted.

XI.

"That a plat of Survey of Township Thirty-nine (39) North, Range Six East (6E), Willamette Meridian, of the land District of Seattle, Washington, was filed in the local land office on February 6, 1907; that prior to the filing of the said Plat, and on May 5, 1902, and at the time when the said W. J. Tincker was in the possession and occupancy of the said land, and claiming to hold the same as a bona fide settler and homesteader, the said defendant, St. Paul, Minneapolis & Manitoba Railway Company filed its List 43 (now Serial 024450) describing a tract of land which it claimed would be described when surveyed as the Southwest quarter (SW¼) of the Northwest quarter (NW¼) of said Section Three (3), in said township and range, under an Act of Congress of August 5, 1892, 27 Statutes 390, entitled: "An Act for Relief of Settlers on Certain Lands in the States of North and South Dakota," and on June 21, 1902, the said St. Paul, Minneapolis & Manitoba Railway Company filed in said Land Office a re-arranged list describing the same land; that accompanying the said original List No. 43 and the re-arranged list above mentioned was the affidavit of Mr. Thomas R. Benton, in support thereof, executed in Ramsey County, Minnesota, on March 22, 1902, in which it is alleged that the said lands "are vacant, unappropriated and are not indicated mineral nor reserve lands, and of character contemplated by said act;" that the said affidavit was untrue and false at the time when the same was made and at the time when the said list was filed, and at all times thereafter in the following particular, to-wit: that

the said land was not vacant and was not unappropriated at said times, but was, in fact, occupied and possessed by the plaintiff's grantor, W. J. Tincker, and had been appropriated by him for the purposes hereinabove mentioned; that thereafter, on February 23, 1907, subsequent to the filing of the Plat of Survey hereinabove mentioned, the said St. Paul, Minneapolis & Manitoba Railway Company filed a Supplemental List 43-A, accompanied by another affidavit of Mr. Benton, to the same effect, and alleging therein that at the time, to-wit: February 23, 1907, the said lands were still vacant and unappropriated; and that this affidavit also was false and untrue in that the said lands were not vacant and unappropriated but were at that time actually occupied, and in the possession of, claimed and appropriated by the plaintiff, Charles W. Reed, as hereinabove mentioned.

XII.

"That on February 6th, 1907, the plaintiff, Charles W. Reed, filed in the Land Office at Seattle, Washington, his application to enter the said Southwest quarter (SW¼) of the Northwest quarter (NW¼) and the said Lot Four (4) and the West half (W½) of the Southwest quarter (SW¼) of said Section Three (3), as and for a homestead, which said application was received by the Register and Receiver of the said Seattle Land Office, without objection, and the said plaintiff was not informed by the said Register or Receiver, nor by anyone else, that the said land had been selected by the said St. Paul, Minneapolis & Manitoba Railway Company, nor had he any knowl-

edge or notice thereof at that time nor at any time thereafter until December 1st, 1909."

Transcript pages 32-35.

The remainder of the findings of fact are principally historical and material as showing the error of the Land Office, the failure to give respondents an opportunity to contest, and the correctness of the proceedure followed in this case.

The material question is, was the land in question segregated from the public domain at the time the petitioner filed its selection list.

Let it be especially noted that the Court found in Finding No. 11, transcript page 34, that prior to the filing of the said Plat, and on May 5, 1902, at the time when the said W. J. Tincker was in the possession and occupancy of the said land and claiming to hold the same as a *bona fide* settler and homesteader, the said defendant (petitioner) filed its List 43.

The settler Tincker testified that: "About March as near as I can get it—between February and May—I went up and blazed a trail across the land and laid a foundation for a cabin." Transcript page 52. This was uncontradicted. The affidavit of Mr. Benton was made in March and the list was filed May 5, so at the

very time the list was made, Tincker was on the land making improvements.

The main issues of this case are determined by the case of *St. Paul M. & M. R. Co. vs. Donohue,* 210 U. S. 21. In that case one Hickey settled upon unsurveyed land. Thereafter the railroad company, under the same Act involved in the case at bar, filed a selection list. Hickey died, and his heir filed a relinquishment in the Land Office. Donohue then filed on the land under the Timber and Stone Act. The railway company claimed that upon the relinquishment of Hickey's heir, the property vested in it under its selection list. In the opinion of Mr. Justice White, it is said:

"The railway company was confined in its selection of indemnity lands to lands non-mineral and not reserved, 'and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection. * * * When the selection and supplementary selection of the railway company was made, the land was segregated from the public domain, and was not subject to entry by the railway company. *Hastings & D. R. Co. vs. Whitney,* 132 U. S. 357, 33 L. ed. 363, 10 Sup. Ct. Rep. 112; *Whitney vs. Taylor,* 158 U. S. 85, 39 L. ed. 906, 15 Sup. Ct. Rep. 796; *Oregon & C. R. Co. vs. United States,* 190 U. S. 186, 47 L. ed. 1012, 23 Sup. Ct. Rep. 673."

St. Paul M. & M. R. Co. vs. Donohue, 210 U. S. 21.

The petitioner in its brief, page 10, says that the question of law submitted to this Court is, does the posting of notices upon the public domain, followed by the blazing of lines and placing of a few poles in the form of a square, withdraw the land thus posted from the possibility of selection by railway companies under such an Act of Congress as the one involved here, when the one posting the notices never at any time, though pretending to claim the land for more than four years, established his residence on the land or cultivated it to any degree, and constantly maintained a home with his family elsewhere. We will undertake to try to answer this question. In the first place, the statement of the facts is not quite exact. We have quoted above the findings of fact which are not questioned here. They are supported by the evidence, but that we will not quote.

Government Circular No. 541, Department of the Interior, General Land Office, entitled: "Suggestions to Homesteaders, Etc.," approved April 6, 1917, on page 4 under the heading "How Claims Under the Homestead Law Originate," reads as follows:

"3-A. Claims under homestead laws may be initiated either by settlement on surveyed or unsurveyed lands of the kind mentioned in the foregoing paragraph or by the filing of a soldier's or sailor's declara-

tory statement or by the presentation of an application to enter any surveyed lands of the kind.

"4-A. Settlement is initiated through the personal act of a settler placing improvements on the land or establishing a residence thereon. He thus gains the right to make entry on the land as against other persons. A settlement on any part of a surveyed quarter section subject to homestead entry gives the right to enter all of that quarter section. * * * When settlement is made on unsurveyed lands, the settler must plainly mark the boundaries of all land claimed. Within a reasonable time after settlement, actual residence must be established on the land and continuously maintained. Entry should be made within three months after settlement on the surveyed lands, or within that time after the filing in the local Land Office of the Plat of Survey of lands unsurveyed when survey was made, otherwise the preference right of entry will be lost."

(Transcript p. 216).

The land was unsurveyed. The Findings of the Court show that it was withdrawn from entry soon after settlement. It shows that filing thereon was made the day that it was opened to filing.

That a claim for homestead may be initiated by settlement is well settled by the decisions of this Court. *Nelson vs. Northern Pacific R. Co.* 188 U. S. 108; *Northern Pacific R. Co. vs. Trodick,* 221 U. S. 208.

We think the following is a proper statement of the law as to what constitutes settlement under the circumstances of the case at bar:

"Right and justice dictate that a person locating upon the public land should be protected whilst he is making the improvements which, when completed, will give him the actual possession, and that he should have a reasonable time within which to do the necessary work. It may often take weeks or months of diligent work to reduce a tract of public land to actual possession, and whilst diligently pursuing the purpose of reducing it to his possession the locator may at times necessarily be compelled to leave it unoccupied. During such periods, surely, the law should protect him, although if ejected he would not be able to show that he had secured an actual possession. That he had not had a reasonable time after his first location within which to secure such possession, and that he had prosecuted the necessary improvement with due diligence, would be a sufficient answer to the failure to show an actual possession. In such case, if the plaintiff shows that he first entered upon the land, marked the boundaries and diligently made preparations to do those acts necessary to constitue an actual possession, he will be entitled to recover."

Stainінger vs. Andrews, 4 Nevada 59.

See also:

Ritter vs. Lynch, 123 Federal 930-933.
Feirbaugh vs. Masterson, 1 Idaho 135.

It seems to us that there can be no doubt from this testimony that Tincker had initiated a homestead claim to his land and had made a settlement thereon prior to the time that the railroad company filed its first selection in May, 1902.

On March 22nd, 1902, Mr. Thomas R. Benton, on behalf of the railroad company, made his affidavit, that said lands "are vacant, unappropriated, etc." At the very time he made this affidavit, Tincker was upon the land, cutting a trail, and laying the foundation for a cabin. Suppose they had then gone into court to determine who was entitled to the land, the railroad company under its indemnity selection, and Tincker under his homestead claim. Could there be any possible doubt as to who would be awarded the land?

Or to put it another way, if the railroad company in the affidavit accompanying its selection list, had stated the facts as they actually were, namely, that Tincker had in September or October previously gone upon the land, marked the boundaries and exercised other acts of dominion to show a settlement, and that at the time the affidavit was made he was upon the land, cutting a trail and building a cabin, does the Court for one moment think that the land office would have permitted the railroad company to select this land? Clearly this was not such land as the railroad

company could select. It was not vacant and unoccupied. It was not land to which no claim had attached or had been initiated, and therefore the filing of their list gave them no rights whatever in this piece of land.

There is another answer to the petitioner's contention; not only does "the law deal tenderly with one who in good faith goes upon public lands in view of making a home thereon," *Ard vs. Brandon,* 156 U. S. 537, but we contend that the railroad company has no right to raise the question whether this settlement and occupancy was sufficient. In the case of *Kansas Pacific R. Co. vs. Dunmeyer,* 113 U. S., 629, it is said:

"It is not conceivable that Congress intended to place these parties (homestead and pre-emption claimants on the one hand and the railroad company on the other) as contestants for the land, with the right in each to require proof from the other of complete performance of the obligation. Least of all is it to be supposed that it was intended to raise up, in antagonism to all the actual settlers on the soil, whom it had invited to its occupation, this great corporation, with an interest to defeat their claims and to come between them and the Government as to the performance of their obligations."

The petitioner's main contention from the statement in its brief appears to be (Petitioner's Brief page 10) that although Tincker might have settled on the land and initiated a claim, he and his successors in interest

lost their right because Tincker did not follow up his settlement by establishing a residence upon the land. The reasons residence was not established appear in part in Finding of Fact No. 8, Transcript page 33. The land was withdrawn from settlement, entry, sale or other disposal. After it was restored to settlement, it was not subject to entry until notice should be given, and upon the first day that it was open to entry the respondent, Reed, filed upon the land.

But passing the question of Tincker's excuse for not establishing a residence upon the land within a short time after the settlement, it seems to us that the petitioner misses the point of the case. The petitioner does not have the right to quesiton the quality of the settlement of the respondents and their predecessors in interest. That could be done only by the Government. The Government has not questioned it. They have patented to Reed all of the land in his homestead except this one forty. The question here is as to the title the petitioner acquired, and the prime question is: Was this such land as they might select. We think we have clearly shown that it was not such land. A settlement had been made upon it, a claim had attached and had been initiated.

As said in the opinion of the Supreme Court of Washington, *Reed vs. Great Northern Railway Com-*

pany, 126 Wash. 319: "An adverse right indicates and describes a valid and subsisting claim, while the addition of the words 'or claim' indicates something less. We think it broad enough to include a claim of any nature. Manifestly, it was not the intention of Congress to constitute the Railway Company a judge of what claims were valid and what invalid, and, therefore, it extended to the Railway Company the right to select only those lands over which there could be no controversy."

The land was not subject to selection by the Railway Company at the time it filed its list. The fact that its list was on file would give it no right to the land if there should subsequently be a lapse of the settler's rights, unless there should be a new filing by the Railway Company before any other right had attached. The Railway Company subsequently filed a corrected list, but when they filed the corrected list, the respondent, Reed, had built a home upon the property and was living there. We do not believe there was any hiatus in the title of the respondents, but even if there were, under the circumstances of this case, it avails nothing to the petitioner.

In the case of *Northern Pacific Railway Company vs. Trodick,* 221 U. S. 208, cited above, one Lemline settled upon the land in 1877. About 1889 he sold his im-

provements to Trodick, who took possession. The lands had not been surveyed when Lemline settled or when he transferred to Trodick. They were not surveyed until August 10th, 1891. The railroad company making the selection under the indemnity act granting odd numbered sections to the Northern Pacific Railroad Company, filed their map of definite location on July 6th, 1882.

Now note the dates. The railroad company definitely fixes its right on July 6th, 1882, because under the decisions the filing of this map fixed their right to the indemity lands. Lemline was at that time in possession of the land. He subsequently conveyed to Trodick in 1889. The survey of the land was filed in 1891. Up to this time, of course, no application had been made by Trodick or Lemline to enter this land, because no application could be made for the entry of unsurveyed land, but the statute required that a settler upon unsurveyed land must make his application to enter the land within three months after the filing of the plat of survey. Trodick did not apply to enter the land until January 10th, 1896, five and one-half years after the plat was filed and five years and three months after the time had expired under the statute within which he could apply.

"Some reliance is placed on the delay occurring after the survey of the lands before Trodick made his homestead application—the statute of May 14th, 1880, Chapter 89, 21 Stat. at L. 140 U. S. Comp. Stat. 1901, S. 1392, prescribing a certain period within which the homesteader should act after the survey of the lands. But that delay was immaterial as affecting the rights of the homestead applicant, because no rights of others had intervened intermediate the survey and Trodick's formal application. A similar question arose in *Whitney vs. Taylor,* 157 U.S.85, 97,, 39 L. ed. 906, 910, 15 Sup.; Ct. Rep. 976, and it was thus disposed of: 'It is true that Sec. 6 of the Act of 1853 (10 Stat. at L. 245, Chapter 145) provides "that where unsurveyed lands are claimed by pre-emption, the usual notice of such claim shall be filed within three months after the return of the plats of surveys to the land offices." But it was held in *Johnson vs. Towsley,* 13 Wall. 72, 87, 20 L. ed. 483, 488, that a failure to file within the prescribed time did not vitate the proceeding, neither could the delay be taken advantage of by one who had acquired no rights prior to the filing. As said in the opinion in that case (p. 90): "If no other party has made a settlement or has given notice of such intention, then no one has been injured by the delay beyond three months, and if, at any time, after the three months, while the party is still in possession, he makes his declaration, and this is done before anyone else has initiated a right of pre-emption by settlement or declaration, we can see no purpose in forbidding him to make his declaration, or in making it void when made. And we think that Congress intended to provide for the protection of the first settler by giving him three months

to make his declaration, and for all other settlers by saying, if this is not done within three months, anyone else who has settled on it within that time, or at any time before the first settler makes his declaration, shall have the better right." See also *Lansdale vs. Daniels,* 100 U. S. 113, 117, 25 L. ed. 587, 589, where it is said: "Such a notice, if given before the time allowed by law, is a nullity; but the rule is otherwise where it is filed subsequent to the period prescribed by the amendatory act, as, in the latter event, it is held to be operative and sufficient unless some other person had previously commenced a settlement and given the required notice of claim." The delay in filing, therefore, had no effect upon the validity of the declaratory statement.'

"It is not for the railroad company to which was wrongfully issued a patent to make an objection to Trodick's claim which the Land Office would not make. The authorities cited show that the ground assigned by the Commissioner was wholly untenable, as matter of law, in that he assumed that the railroad company acquired an interest in the land by the mere location of the line when Lemline was, at the time, in actual occupancy as a homestead settler."

Northern Pacific Railway Company vs. Trodick, 221 U. S. 208.

To us it seems that the question under consideration is finally determined by the case of *St. Paul M. & M. R. Co. vs. Donohue,* 210 U. S. 21, which has already been referred to. In that case we had the settlement,

and the subsequent filing of a list under the same statute by the Railway Company. The settler then actually executed and filed a formal relinquishment and another person made an entry of the land. The Railway Company contended that upon the filing of the relinquishment, the land was subjeced to the claim of the Railway Company because of its list previously filed. This Court held that such was not the law. The facts in that case cannot be distinguished from the facts in this case, save only that here the settler did not execute a relinquishment, thus making this a stronger case.

The petitioner places much reliance upon the case of *Great Northern Railway Company vs. Hower,* 236 U. S. 702. To us it seems this case can be distinguished from the case at bar. Carter in that case had secured a patent to a quarter section of land. His settlement, residence and improvements were not only not upon the quarter section patented, but they were not even upon contiguous land, as there was an intervening forty acres between his residence and the property claimed. Mr. Justice Day, in the opinion, says: "In this case it appears that the residence was not upon any part of the tract claimed by the homesteader, nor was the residence upon a contiguous tract of land, but was entirely separate and apart from the land claimed."

The question in that case appears to have been whether the settler had maintained such a residence upon the property as to entitle him to a patent. The question here is whether the Railway Company selected land that was open to selection. Our question is not whether Tincker perfected the right to a patent, but the question is: Had he initiated a claim. It does not appear in the Hower case that a claim was ever initiated to the quarter section that was there involved. In the case at bar there is no question that Tincker posted his notices, made his improvements, and took the initial steps of settlement upon the land in question. In due time it was followed by a residence upon the land, which has been followed up now for many years. The Government would not question the sufficiency of the residence and settlement; the Railway Company undertakes to do so.

Certainly the Hower case does not hold that a claim to a homestead may not be initiated by a settlement. It does not hold that a residence must be established as the first act of settlement. It does not hold that a claim having been initiated, the land is open to selection by the Railway Company, but it does hold that if a claim or right is to defeat the selection of a Railway Company it must be a claim to the same land that the Railway Company selects. To us it appears that

settlement is an ultimate fact, the culmination of a series of acts inspired by one purpose. It is initiated by the first act of dominion. One who has ever seen an Indian Reservation opened in the old days knows how it is accomplished. To acquire a patent one must reside upon the land the statutory period of time, but to exempt the land from the right of selection by the Railway Company, it is not necessary that a claimant should have perfected his right to a patent. It is sufficient for him to have initiated a claim, and if at the time the list is filed the claim has been initiated, then the land is not such as may be selected. The land may subsequently be subject to selection by the Railway Company, but the fact that a list is filed when it is not so subject will avail naught to the Railway Company unless it refiles while the land is open to selection. In this case it was filed while it was not subject to selection; when it filed its corrected list it was not subject to selection because Reed resided upon it and therefore the respondents and not the petitioner were entitled to the land.

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